IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 94 of 2003
&
CIVIL APPLICATION No. 7826 of 2003

For Approval and Signature:

HONOURABLE Ms. JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to civil judge ?

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PATEL PRAHLADBHAI MAGANLAL - Appellant(s)

Versus

PATEL PARVATIBEN JESANGDAS - Defendant(s)

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Appearance :
MR PRAKASH K JANI for Appellant
MR DILIP B RANA for Respondent

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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT
6th August, 2007.

ORAL JUDGMENT

This Appeal under Section 100 CPC has been preferred by the plaintiff in Regular Civil Suit No.

89 of 1994 against the judgment and order dated 8th October, 2001 passed by the learned Joint District Judge, Mehsana in Regular Civil Appeal No. 147 of 1999.

The plaintiff is the owner of the land Survey No. 543-*paiki* situated at village-Kansa, Taluka Visnagar, District Mehsana. The defendant is the owner of the contiguous land Survey No. 546/1. According to the plaintiff, the defendant had encroached upon 79 sq.m. of the land Survey No. 543-*paiki* at the southern end. The plaintiff, therefore, instituted Regular Civil Suit No. 89 of 1994 in the court of learned Civil Judge [JD], Visnagar. He prayed for removal of encroachment and recovery of possession of the suit land. The defendant contested the suit by written statement Exh.30. The learned Civil Judge, by judgment and order dated 15th September, 1999, recorded finding in favour of the plaintiff and passed decree for removal of encroachment and recovery of possession, as prayed for.

Feeling aggrieved, the defendant preferred Regular Civil Appeal No. 147 of 1999 in the Court of

learned District Judge, Mehsana. The learned Joint District Judge was, by *impugned* judgment and order, pleased to allow the Appeal. The lower appellate court was pleased to hold that the measurements carried out by the Maintenance Surveyor were not proper. The Maintenance Surveyor had failed to measure all the surrounding lands to draw final conclusion. According to the lower Appellate Court, the plaintiff had failed to prove that the defendant had encroached upon the land of the plaintiff. Therefore, the present Appeal.

Pending this Appeal, the learned advocate Mr. Rana appearing for the defendant had made a grievance that unless all the surrounding lands were measured, it cannot be conclusively said that the defendant has encroached upon the land of the plaintiff. Considering the said grievance, this Court [*Coram* : ***D.H Waghela, J.***] on 4th July, 2005 made order as under:-

> ***"The learned counsel appearing on both sides submitted that in order to put an end to the controversy of measurements of the respective lands held by the appellant and the respondent, both the parties jointly proposed to apply for survey and taking measurement of the land in dispute as well as the surrounding lands. The appellant is ready and willing to incur the***

necessary expenditure for such survey and measurement being done in presence of the parties or their representatives by the surveyor in the office of the District Inspector of Land Records at Mehsana. It was also submitted that such survey followed by report may be obtained within a period of four weeks for being presented before this Court and the parties would be agreeable to accept the finding of such report. Accordingly, hearing of this Appeal is adjourned to 08.08.2005 for the parties to take the proposed action and submit the report by the next date. Direct service is permitted."

It appears that the report made pursuant to the aforesaid order had not been placed on the record of this Appeal. Consequently, once again, order was made on 18th October, 2005 [*Coram* : ***A.L Dave, J.***] directing the Maintenance Surveyor to take the measurement afresh. A fresh order came to be made on 19th January, 2007 [*Coram* : ***R.S Garg, J.***}. Pursuant to the said order, a report was made on 9th April, 2007. Under the said report, the defendant was alleged to have encroached upon 99 sq.mtrs. of the land of the plaintiff. This report too was assailed by Mr. Rana. According to him, the said report also was not made in accordance with the directions issued on 4th July, 2005. Once again, this Court by Order made on 3rd May, 2007 directed the District Inspector of Land Records to carry out survey afresh of not only the land of

the plaintiff and the defendant but also of all the surrounding plots of lands. In compliance with the said order, the District Inspector of Land Records has made affidavit on 3rd July, 2007. He has produced copy of the panchnama drawn, statement made by the parties and the sketch of the plots in question. The District Inspector of Land Records has opined that defendant has encroached upon the plaintiff's land Survey No. 543-*paiki* to the extent of 99 sq.meters as shown in red ink triangle on the sketch.

This report also is objected to by Mr. Rana. According to him, the Maintenance Surveyor did measure all other parcels of land except the land belonging to the defendant. The report is made without carrying out measurements, as directed. The objection is unsustainable. The District Inspector of Land Records has clearly mentioned that all pieces of land were measured; the land Survey No. 546/1 admeasures 6422 sq.m, and that the defendant has been found in possession of 6521 sq.m of land. In view of this fresh report made by the District Inspector of Land Records and the measurements taken, this Appeal deserves to be allowed.

The impugned judgment and order dated 8th October, 2001 passed by the learned Joint District Judge, Mehsana in Regular Civil Appeal No. 147 of 1999 is *quashed* and set-aside. The Regular Civil Suit No. 89 of 1994 is allowed. It is directed that the defendant shall hand over the vacant possession of the piece of land admeasuring 99 sq.m. [*shown in red colour triangle*] in the sketch produced by the District Inspector of Land Records. The plaintiff do recover possession of the said piece of land. The decree be drawn accordingly. The defendant shall bear the cost throughout.

Mr. Rana has also submitted that the plaintiff had prayed for recovery of possession of 79 sqm. of land. The earlier report of the Maintenance Surveyor also suggested that the defendant had encroached upon the land of the plaintiff to the extent of 79 sq.m. The decree now cannot be passed for recovery of possession of 99 sq.ms. The objection is unsustainable. Both the learned advocates had agreed for fresh measurement and to abide by the report that may be made by the District Inspector of Land records.

Civil Application stands disposed of.

{Ms. R.M Doshit, J.}